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No. 07-1460

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In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

SUPPLEMENTAL BRIEF OF GOVERNOR BOB RILEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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September 26, 2008

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SUPPLEMENTAL BRIEF IN OPPOSITION

Plump's Supplemental Brief in support of his Motion to Dismiss or to Affirm is best understood as an effort to better his chances to recover attorneys' fees. Plump suggests that the appeal should be dismissed without vacating the judgment of the District Court because (i) this appeal is now moot and (ii) it is somehow Governor Riley's fault that the appeal is moot. It is not entirely clear that the appeal is moot at this time, though it will become so at least by November. In any event, the mooting of this litigation—whenever it occurs—is not through any fault of the Governor. The Governor took no voluntary action that would have lead to the mooting of this case; everything he did was required of him either by the federal court or by federal law.

Events continue to unfold. The District Court's judgment was made without the benefit of this Court's opinion in *Riley v. Kennedy*, 553 U.S. ___, 128 S.Ct. 1970 (2008), without the benefit of an Alabama Supreme Court decision concerning the validity under Alabama law of the practice Plump challenges, and without the views of the Department of Justice (DOJ) expressed just last week. The judgment was also made in error when the purported baseline was an unconstitutional practice, when the challenged practice was in force or effect on Alabama's coverage date, and when the District Court had only a motion for preliminary injunction before it. The appropriate action now is not to leave the District Court's judgment in place, but instead to vacate and remand.

1. The original narrow focus of this case was whether Governor Riley's appointment was a "change" for purposes of Section 5. Plump filed

this action asking that Governor Riley's appointment be vacated, if not precleared. The focus of the case is, and always has been, on whether an appointment could be made at all, not on how long the appointee will serve. This distinction is relevant to the question of whether the District Court's judgment should be vacated: As discussed below, the appointment was ultimately precleared, but not because of Plump's efforts or because Governor Riley gave up on his positions in this case, and preclearance may not end the litigation.

In the District Court, Plump argued that the appointment was a "change" for purposes of Section 5 because the practice of filling vacancies by gubernatorial appointment was different from the practice he claimed to be the baseline, namely special election as required by a 1977 local law (Act No. 77-784). Governor Riley contended, and continues to contend, that preclearance is not required because gubernatorial appointment was the coverage-date practice and because the 1977 local law violated Section 105 of the Alabama Constitution, *see Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988); *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005).

The District Court entered a judgment declaring that Governor Riley's appointment must be precleared. The relief ordered by the District Court put Governor Riley in a box: He could immediately appeal the judgment, in which case the appointment would be vacated; he could do nothing, in which case the appointment would be vacated; or, he could seek preclearance, in which case Commissioner Bowman would remain in office while DOJ considered the preclearance submission. *See* Amended Judgment, JS at 17a.

Governor Riley chose the only option that would preserve the *status quo*. The State made a peclearance submission, while maintaining the Governor's position that preclearance was not required. *See* Doc. No. 38.[1] Some time after the preclearance submission was made, and while it was pending, the Governor timely filed his notice of appeal. *See* JS at 37a, 72a. Governor Riley also sought a stay pending appeal, and that stay is what has kept his appointee in office.[2]

2. In light of the curious order entered by the District Court and several important events which occurred after the District Court entered its judgment, it is not clear what would happen to Commissioner Bowman if this Court were to vacate its stay and dismiss this appeal, while leaving the District Court's judgment in place; for this reason, this appeal may not yet be moot.

In litigation initiated after the District Court entered judgment, the Alabama Supreme Court held that the Governor's appointment was valid as a matter of Alabama law. *Working v. Jefferson County Election Commission*, ___ So.2d ___, 2008 WL 2569255 (Ala. June 30, 2008), reproduced in the Brief in Opposition at 6a. The Court never rejected

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[1] The submission was later supplemented.

[2] Plump suggests that the State could have withdrawn the submission once this Court granted the Governor a stay pending appeal. Given that Governor Riley had told the District Court that the submission would be made, such a move would have been beneath a Sovereign. Additionally, Governor Riley's representation was made through an officer of the Court. Doc. No. 34.

Governor Riley's argument that the 1977 local law was unconstitutional, but instead resolved the case on another ground: The Court interpreted a subsequent Act (Act No. 2007-488) and found that it had repealed Act No. 77-784. Having resolved the appeal on statutory grounds, the Alabama Supreme Court soundly declined to address the constitutional issue. Brief in Opposition at 32a-39a. Of course, a legislative act repealing a statute does nothing to negate Governor Riley's argument that the local law was unconstitutional and, hence, void *ab initio*.

The Alabama Supreme Court further ruled that Act No. 2007-488 required a November 2008 election. Under the new Act, the Governor's appointee serves only until the next general election, not for the full unexpired term. Brief in Opposition at 39a-40a.

While the *Working* litigation is obviously related to this litigation, it presented issues distinct from those that were before the District Court. The question of whether the appointment was valid as a matter of Alabama law was one the District Court properly avoided. *See* Memorandum Opinion, JS at 6a. The question of how long the appointment would last was one that was never raised in this case. And, the *Working* Court did not even comment upon whether Section 5 required Governor Riley to submit the appointment for preclearance. Consequently, when the State of Alabama submitted for preclearance several matters arising out of the *Working* case, they were related to, but distinct from, the preclearance submission that arose out of this case. (Specifically, the State submitted the relevant portions of Act No. 2007-488 for preclearance. *See* Letter from Ala. Att'y Gen. Troy King to Chief,

Voting Section (July 28, 2008) (*Working* Supreme Court submission); Brief in Opposition at 4-5 & n.3.

Additionally, a third submission arising from the trial court's order on remand in *Working* was made. That submission concerned the details of holding an election in November when both the deadline for qualifying as a candidate and the primary election had passed.[3] Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission)

Immediately after the two submissions arising from the *Working* litigation were made, two of Plump's attorneys sued the State and the Jefferson County Election Commission on behalf of Doris Powell. Plaintiff Powell argued that the November 2008 election could not be held unless the preclearance submissions were approved, and that the February 2008 special election (the one held under the unconstitutional local law which had been repealed) must instead be enforced. *Powell v. State of Alabama*, Civil Action No. 2:08-CV-01345-LSC (N.D. Ala. 2008) (three-judge court). Plump tried unsuccessfully to substitute himself as the plaintiff in that case. Powell then moved to voluntarily

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[3] While back in the trial court on remand, Plump moved that court to enjoin Jefferson County election officials from complying with the Alabama Supreme Court decision if preclearance was not obtained. *Working v. Jefferson County Election Commission*, Civil Action No. CV-2008-900316 (Jefferson County Circuit Court, 2008), Motion of Plump to Amend Order on Remand (July 26, 2008). The trial court denied the motion. *Id.*, Order Denying Motion to Amend Order on Remand (July 28, 2008). The preclearance submissions were faxed to DOJ the same day.

dismiss her suit on September 5, 2008, and the motion was granted. *Powell*, Doc. Nos. 39 & 41.

At that point, there were three preclearance submissions pending before DOJ related to the Jefferson County Commission vacancy: (1) A submission that resulted from this case, seeking preclearance of the Governor's appointment; (2) a submission arising from the Alabama Supreme Court decision in *Working*, which concerned two Statewide provisions of Act No. 2007-488 which, in Jefferson County, repealed Act No. 77-784, shortened Commissioner Bowman's term, and made clear that the February 2008 special election results should not be certified; and, (3) a submission arising from the trial court's *Working* order, concerning election mechanics.

Last week, on September 15, 2008, DOJ issued its preclearance decision. As to the first submission, which was made as a result of the litigation in this case, DOJ concluded that "no determination by the Attorney General is required or appropriate" because the submission had been, in DOJ's estimation, "supersede[d]" by the second submission arising from the Alabama Supreme Court decision in *Working*. *See* Letter from Christopher Coates, Chief, Voting Section, to Ala. Att'y Gen. Troy King (September 15, 2008) ("State letter"), reprinted at 1a.

As to the second submission, DOJ did not object. *Id.* This means that the repeal of Act No. 77-784, the non-certification of the February special election results[4], the practice of gubernatorial appointment to

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[4] The State included the non-certification of the February 2008 special election results in its second submission. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July

fill vacancies on county commissions (Statewide), and the practice of the appointee serving until the next general election (Statewide) are now precleared. Accordingly, in Jefferson County, an election will be held this November to fill the last two years of Larry Langford's term. William Bell, the Democrat who "won" the February special election, will be the only candidate on the ballot; the Republican Party did not nominate a candidate and Commissioner Bowman was unable to qualify as an independent candidate. When Commissioner Bowman leaves office in November, *see* Ala. Code 11-3-1(d), this litigation will assuredly be moot; until that day, Commissioner Bowman serves by virtue of the Governor's appointment.

As to the third submission, DOJ spoke not a word, instead granting preclearance to what was apparently a redundant (and later) submission made by local officials. *See* Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008), reprinted at 4a.

As a practical matter, one might reason that DOJ's grant of preclearance to the State's *Working* submission and to the local officials' election mechanics submission essentially eliminates any need for preclearance of the original submission

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28, 2008) (*Working* Supreme Court submission). DOJ did not object, however its letter does not mention this change. *See* State Letter, reprinted at 1a. Instead, DOJ seems to have ignored that portion of the State's submission and instead precleared the change within the context of a separate submission that local officials apparently made. *See* Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008), reprinted at 4a.

made by Governor Riley. It is not entirely clear, however, that it moots this litigation.

The District Court held that a preclearance submission was required to avoid vacatur of the Governor's appointment and set a deadline for its attainment. The State made the submission under protest. In doing so, the State and the Governor endured the harm that comes from begging for federal permission to follow State law (more specifically, to avoid enforcement of an unconstitutional statute) in our otherwise federalist system of government. Never did the Governor waiver from his position that preclearance was not required under the circumstances in which he made the appointment. Moreover, for its part, DOJ did not grant preclearance; it declared the submission not "appropriate." State Letter, at 2a.

Thus, if this Court dismisses the appeal and leaves the judgment in place, all stays are lifted. Plump or a new plaintiff might argue that the District Court's judgment requires the appointment to be vacated immediately: the preclearance submission arising out of *this* case was *not* granted, and the only preclearance that was granted came well after the District Court's last deadline. If vacating this Court's stay while leaving the District Court judgment in place means that Commissioner Bowman is ousted from office, this appeal is not moot.

3. Even if this appeal were moot today, it is not because Governor Riley is the "loser" who has "left the fray," such that leaving the District Court's Judgment in place would be proper. Plump's Supplemental Brief at 5. Under no

circumstances has Governor Riley "left the fray"; nor has he lost.

The odd structure of the District Court's judgment left Governor Riley no choice but to have the State make the submission, which it did, under protest. Governor Riley has consistently preserved his argument that Section 5 did not reach the appointment. The State's concession that statutory changes did require preclearance cannot be substituted for the Governor's on-going insistence that preclearance of his appointment of Commissioner Bowman was not needed. Hence, the Governor has not "left the fray."

Furthermore, DOJ concluded that "no determination by the Attorney General is required or appropriate" as to the submission made in this litigation. State Letter, at 2a. That is, DOJ did not grant preclearance, as Plump said it did, Plump's Supplemental Brief at 3. DOJ instead disagreed with the District Court as to whether the submission was needed, deeming it "inappropriate" under 28 C.F.R. § 51.35. That is hardly a win for Plump, who had urged the District Court's action, and is hardly a loss for Governor Riley.

The cases Plump cites to urge this Court to leave the judgment in place are inapposite. In *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), the owner of an adult-oriented establishment appealed the denial of a license renewal application. After petitioning for certiorari, the owner withdrew its renewal application and closed its business. *Id.* Similarly, in *U.S. Bancorp. Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the case mooted on appeal because the parties settled their dispute. Dismissal (without vacatur) was considered

appropriate in those cases because "the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall*, 513 U.S. at 24. There was no comparable "voluntary action" here.

It was the Alabama Supreme Court's reasonable and judicious decision to resolve the *Working* appeal on statutory grounds, *cf. Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944), which gave the State no choice under Section 5 but to make additional preclearance submissions. Prior to that, it was the Legislature's imperative to pass Act No. 2007-488 to modernize county government. Governor Riley does not have a voice in the Alabama Supreme Court other than as a party, and he is under no obligation to veto legislation that might, down-the-road, be construed to harm his litigation position in an unanticipated fashion. The preclearance submission that was made for Governor Riley remained pending, and was declared inappropriate. Governor Riley bears no fault here; he has taken no "voluntary action" to walk away.

Given that, neither the Governor nor the State should be left under the weight of the District Court's judgment and any precedential value it may have. The harm is only exacerbated by the fact that the judgment was issued under the cloud of procedural error (skipping to the merits) and without the benefit of this Court's decision in *Riley v. Kennedy*, the *Working* litigation, and the September 15, 2008 determinations by DOJ.

Leaving the District Court's erroneous judgment in place would matter for another reason. All the talk of "winners" and "losers" is usually a precursor to an application for attorneys' fees. The fee issue

should, of course, be decided in the District Court, but this Court's actions will affect the arguments. Governor Riley will contend that fees are inappropriate when the following is true:

(1) Governor Riley's arguments that the practice of special elections was never in force or effect, that gubernatorial appointment was the coverage date practice, and that the District Court improperly skipped to the merits have not been tested on appeal.

(2) Facts relevant to Governor Riley's arguments and to other matters taken up by the District Court occurred after the District Court rushed to judgment and this appeal was taken.

(3) While the practice of gubernatorial appointment has been precleared, the preclearance was granted as a consequence of a submission arising out of the state-court litigation, not the submission arising out of this case.

(4) While the issues in this case are likely to become moot, or even if they already have, it is for reasons that were outside the Governor's control, and he has never waived the arguments raised in this appeal.

Governor Riley is not attempting to argue the attorneys' fee issue to this Court. Rather, his point is that relief Plump seeks (dismissal without vacatur) appears to be structured with the fee issues in mind. An additional reason that the judgment should be *vacated* and remanded is that Plump should not be characterized as the "winner" under the circumstances of this case.

CONCLUSION

This Court should note jurisdiction, and either reverse the District Court or vacate and remand. If this Court determines that the appeal is presently moot, or if the appeal becomes moot while it is still pending, this Court should vacate the District Court's Judgment and dismiss the appeal as moot, through no fault of the Governor.

Respectfully submitted,

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September 26, 2008

U.S. Department of Justice

Civil Rights Division

CC:RSB:TFM:DJ:maf
DJ 166-012-2
2008-1576
2008-3861

Voting Section - NWB
950 Pennsylvania Ave., N.W.
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September 15, 2008

The Honorable Troy King
Attorney General
Misty Fairbanks, Esq.
Assistant Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King and Ms. Fairbanks:

This refers to the changes in the procedures for filling vacancies on the Jefferson County Commission from special election by local act to gubernatorial appointment under Ala. Code § 11-3-6, pursuant to *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988) and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005); Ala. Act 2007-488, insofar as new Ala. Code §§ 11-3-1(b) and 11-3-1(f) provide procedures for filling vacancies on Alabama county commissions; the repeal by Ala. Act 2007-488 of former Ala. Code § 11-3-6; the repeal by Ala. Act 2007-488 of Ala. Act 1977-784; and, application of Ala. Code §§ 11-3-1(b) and 11-3-1(f) to Jefferson County pursuant to

Working v. Jefferson County Election Commission, --- So.2d ---, 2008 WL 2569255 (Ala. 2008), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on March 19, 2008, and July 28, 2008; supplemental information was received through August 19, 2008.

The Alabama Supreme Court, in *Working*, held that the appropriate method for filling vacancies on the county commission in Jefferson County is through the procedures contained in Ala. Act 2007-488 as it amends Ala. Code §§ 11-3-1(b) and 11-3-1(f), rather than by special election under the 1977 local act or by gubernatorial appointment for the remainder of the vacated term pursuant to former Ala. Code § 11-3-6, as described by *Stokes* and *Riley*. *See Working*, 2008 WL 2569255, at *8-*12. Therefore, your July 28, 2008, submission supersedes the method of filling vacancies embodied in former Ala. Code § 11-3-6, as described in *Stokes* and *Riley*, which was submitted on March 19, 2008. Accordingly, no determination by the Attorney General is required or appropriate concerning this earlier submission. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.35.

With respect to the remaining specified changes, the Attorney General does not interpose any objection. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. 28 C.F.R. 51.41.

According to your July 28 letter, some remaining parts of Ala. Act 2007-488, namely the

revisions it makes in Ala. Code 11-3-1(a), and that part of Ala. Code § 11-3-1(b) that enforces Ala. Code § 11-3-1(a), have not been submitted for review under Section 5 at this time. Your letter indicates that the State has yet to determine the nature of the actual changes in question. At such time as the nature of the changes is determined, such changes are subject to Section 5 review. Changes that affect voting are legally unenforceable unless Section 5 preclearance has been granted. *Clark v. Roemer*, 500 U.S. 646 (1991), 28 C.F.R. 51.10.

Because the Section 5 status of these changes has been before the courts in *Plump v. Riley*, No. 2:07-cv-1014-MEF (M.D. Ala.), *on appeal as, Riley v. Plump*, No. 07-1460 (U.S. Supreme Court), *Powell v. Alabama*, No. 2:08-cv-01345-LSC (N.D. Ala.), and *Working v. Jefferson County*, No. 08-cv-900316 (10th Jud. Cir. Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,

[signature illegible]
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record (see attached list)

[cc list omitted]

U.S. Department of Justice

Civil Rights Division

CC:TFM:DJ:par:maf
DJ 166-012-3
2008-4502

Voting Section - NWB
950 Pennsylvania Ave. N.W.
Washington, DC 20530

September 15, 2008

The Honorable Alan L. King
Probate Judge
Mr. Sidney F. Browning
Supervisor of Elections
Jefferson County Courthouse
716 Richard Arrington Jr. Boulevard North, Suite 130
Birmingham, Alabama 35203

Dear Judge King and Mr. Browning:

This refers to the changes occasioned by the Order on Remand from the Supreme Court of Alabama in *Working v. Jefferson County Election Commission*, --- So.2d ----, 2008 WL 2569255 (Ala. 2008), including the injunction against certification of the results of the February 5, 2008 special vacancy election, and the procedures for conducting the November 4, 2008, special vacancy election, for Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 26, 2008.

The Attorney General does not interpose any objection to the specified changes. However, we note

that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Since the Section 5 status of these changes has been before the courts in *Plump v. Riley*, No. 2:07-cv-1014-MEF (M.D. Ala.), *on appeal as, Riley v. Plump,* No. 07-1460 (U.S. Supreme Court),*Powell v. Alabama*, No. 2:08-cv-01345-LSC (N.D. Ala.), and *Working v. Jefferson County,* No. 08-cv-900316 (10th Jud. Cir. Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,
/s/ Timothy Mellet
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record (see attached list)

[cc list omitted]